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APPENDIX

**APPENDIX A — BENCH MEMORANDUM OF UNITED
STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CRIMINAL

NO. 80-00346(1)(2)

UNITED STATES OF AMERICA

vs.

FRANK CAPOBIANCO and ROBERT CIRILLO

Philadelphia, Pa., March 13, 1981

Before HON. JOHN B. HANNUM, J.

PRESENT:

ROBERT E. WELSH, ESQ.
representing Government

ANDREW G. GAY, ESQ.
representing Frank Capobianco

BENCH MEMORANDUM

MR. GAY: May I address the Court, sir?

THE COURT: Fine.

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I would just ask you to pause for just a moment.

I will state this for Mr. Bosta's convenience:

This is United States of America v. Frank Capobianco and Robert Cirillo; Robert E. Welsh, Esq., Assistant United States Attorney; Andrew G. Gay, Esq., for Frank Capobianco; Herbert L. Ocks, Esq., for Robert Cirillo.

Now, your representation, please, Mr. Gay.

MR. GAY: Yes, sir.

When I received notice of these proceedings, I called Mr. Ocks' office.

Mr. Ocks was out of town and will not return until this coming Monday, I understand.

I was authorized by his partner to appear here in his behalf.

THE COURT: And do you regard it not necessary that Frank Capobianco and Robert Cirillo be not present?

MR. GAY: I see no need for their presence here today, Your Honor. There is no rule that I know of that requires it. I do not believe these to be a stage of the proceedings where their presence is necessary.

THE COURT: Very good.

Have you any representation to the contrary of what Mr. Gay has related to the Court?

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MR. WELSH: No, sir.

THE COURT: This bears Criminal Docket No. 80-00346(1)(2).

Bench Memorandum, March 13, 1981, 3:00 P.M.; order to follow.

I. Background

A four-count indictment was filed against both defendants on October 24, 1980. Both defendants were charged with two counts of possession with intent to distribute a controlled substance (methaqualone and marijuana) in violation of 21 United States Code, Section 841(a)(1).

The defendant, Cirillo, was additionally charged with two counts of unlawful possession of a firearm in violation of 26 United States Code, Section 5861(d) and (i).

Each defendant has moved to suppress the evidence pursuant to Federal Rule of Criminal Procedure 12.

A lengthy suppression hearing was held on December 22, 1980.

Following receipt of transcript, Andrew G. Gay, Esq., on February 4, 1981, requested oral argument and that was held February 17, 1981.

II. The Motions

The two motions have alleged the same grounds and are supported by the same memorandum of law.

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Defendants raise four arguments in their memorandum supporting their proposed findings of fact and conclusions of law:

1. The interception of the 9:51 P.M. telephone call did not comply with the minimization requirements of Judge Pollak's order of August 25, 1980.

2. The affidavit in support of the search-and-seizure warrant did not set forth sufficient probable cause.

3. The affidavit used in determining whether probable cause existed to justify the issuance of a search warrant contained completely unsubstantiated and false allegations.

4. The controlled substances seized by the Government in the defendant's bedroom and bathroom closets were not in "plain view" and, therefore, illegally obtained.

A. Was the interception of the 9:51 P.M. telephone call a violation of the minimization requirements of Judge Pollak's order authorizing the wiretap?

The statute authorizing wire interceptions contains a provision known as the "minimization requirement" which is designed to limit the intrusive aspect of wiretaps as much as possible.

The provision is found at 18 United States Code, Section 2518(5) which states in part:

"Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise

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subject to interception under this chapter and must terminate upon attainment of the authorized objective, or in any event in thirty days."

In accordance with the above provisions, Judge Pollak included in his order authorizing the wiretap in this case certain specific minimization requirements:

Providing that, with respect to the interception of wire communications on telephone (215) 335-9861, the following conditions shall apply:

(1) no communications shall be intercepted unless it has been determined that either Charles T. Conwell, Michael James Mangini, Joseph Inadi, or Oscar Glassman are within the premises known as the Waiting Room Bar, . . . (2) with respect to outgoing telephone calls made from telephone (215) 335-9861, monitoring shall cease after 30 seconds of conversations unless it is determined that Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, or Oscar Glassman is a participant in the conversation.

First addressed is whether the first limitation, emphasized above, has been followed.

Before the agents were permitted to intercept calls over the subject telephone at the Waiting Room Bar they had to first determine whether one of the named individuals who were under investigation — none of whom are the defendants in this case — were within the bar.

The Government contends that they complied with this limitation because they intercepted an incoming call at 8:41 P.M. which was answered by Mangini, one of the named individuals

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in Judge Pollak's order; therefore, the Government argues that if Mangini was on the premises at 8:41 P.M., "it is reasonable to assume that . . . he was also there at 9:50 P.M." when the defendant Cirillo's call was intercepted.

Defendants' proposed findings of fact and conclusions of law and sur motion to suppress evidence at Page 7 related:

"The Government presented *no evidence* (emphasis defendants') that by visual observation it had been determined that at 9:51 P.M., any of the named subjects were inside the Waiting Room Bar. The Government tries to justify the interception of the 9:51 P.M. call by arguing that 'it is reasonable to assume that if 'Nails' was there at 8:41 P.M., he was also there at 9:51 P.M.,'

and thus, the interception was in compliance with Judge Pollak's order.

"No assumption could be more unreasonable, since during the 8:41 P.M. conversation, 'Nails,' in response to Cirillo's request to leave a message for Hogan, told Cirillo, 'All right now, I'm gonna leave, so I'll leave it with my uncle.' (Government Exhibit 47, Page 4.) The only reasonable *assumption* (emphasis defendants') that Agent Heilman could have drawn from that conversation was that 'Nails' was about to leave the bar and not that his presence there was to continue."

Exhibit 47, Page 4, reads:

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"MM: Alright now I'm gonna leave so I'll leave it with my uncle."

If there was a comma behind as opposed to before alright, so that the word now meshed with "I'm gonna leave" instead of comma following the word now, the crucial immediacy feature might weigh more to immediacy, but the presence of comma beyond the word now, weighs that "Nails' " departure was not immediate.

The placement of comma is to set off words or phrases.

In the patois of the street, for illustration, some people say "look now" or "You know what I mean." These are illustrations of redundant preamble.

Agent Heilman was aware of the nature of the Waiting Room Bar. See Page 18 Storey affidavit, Appendix A:

"Patrons who frequent the Waiting Room Bar are all acquainted with one another and in some way involved in criminal activity."

See also Page 34 Storey affidavit, Appendix A:

"Conwell utilizes the Waiting Room Bar as 'a place to hustle' and a location where he can make contacts. This business is strictly a front operation for Conwell, and he is not concerned if the bar and restaurant business is unsuccessful. Conwell and Mangini are the sole owners of this business."

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In the context of all the proceedings, "All right now, I'm gonna leave, so I'll leave it with my uncle," doesn't necessarily mean immediate departure and, therefore, agents listening to telephone call was not unreasonable within the spirit of the minimization order.

To conclude:

The minimization order of Pollak, J., was not violated because voice identification placed Mangini on premises at 8:40 P.M. and not unreasonable to assume that he was still there at 9:50 P.M.

Even if the Court were to hold that there was not strict compliance with the minimization aspect of Judge Pollak's order, this would not warrant suppression of evidence since the wiretap as a whole was conducted in a reasonable manner. See *Scott v. United States*, 436 U.S. 128 (1978).

The second and third points raised by defendants in support of their motions challenge the affidavit for the search warrant, admitted as Government Exhibit 37 at the suppression hearing.

The Court rejects these challenges. The affidavit supporting the search warrant sets forth facts sufficient to establish that there was probable cause to believe that a contraband firearm, plus ammunition, was on the premises known as Apartment N-15, 2505 Old Trevoise Road, Trevoise, Pennsylvania.

The Fourth Amendment protects against "unrea- [sic] searches and seizures" and provides that "no warrants shall issue, but upon probble cause."

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The standards governing the issuance of search warrants have been summarized by the Supreme Court in *Spinelli v. United States*, 393 U.S. 410 (1969).

The court in *Spinelli* instructed "that only the probability, and not a *prime facie* showing, of criminal activity is the standard of probable cause, *Beck v. Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on their use of common sense, *United States v. Ventresca*, 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States*, 362 U.S. 257, 270-271 (1960)" and *Spinelli*, 393 U.S. at 419.

The affidavit here at issue related the existence of the wiretap pursuant to Judge Pollak's order. The affidavit also related the occurrence of the crucial telephone call between the defendant, Cirillo, and one later identified to be Charles Hogan.

The affidavit also related that Cirillo advised Hogan that he (Cirillo) could sell Hogan a Thompson submachine gun with ammunition.

This recitation contained in the affidavit was sufficient, without more, for the magistrate to conclude that there was probable cause to believe a crime was being committed or about to be committed.

However, the magistrate's inquiry could not have ended there. The magistrate also had to determine that there was probable

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cause to believe that the instrumentalities of that crime could be found at the premises known as 2555 Old Trevoise Road, Apartment N-15, Trevoise, Pennsylvania.

The heart of defendants' challenge to the search warrant focuses upon this crucial determination.

Defendants argue first, that there was no probable cause to believe that the instrumentalities of crime were at the apartment.

Accepting defendants' argument would result in the imposition of overly restrictive limitations upon the magistrate's function in rendering a judgment on the existence of probable cause.

Given that Cirillo had the contraband for sale, given that he was calling from the premises known as 2555 Old Trevoise Road, Apartment N-15, and given that he resided there — the magistrate's neutral determination that the contraband was at the residence was a reasonable exercise in common sense.

The Court's acceptance of the defendants' argument that there was no probable cause to believe the contraband was at the apartment would result in the imposition of "niggardly limitations" on the magistrate's role in judging the existence of probable cause.

The Court declines to impose such restrictions on the magistrate's use of his common sense.

This brings us to defendants' second attack on the affidavit — that it contained material misrepresentations rendering it infirm under *Franks v. Delaware*, 438 U.S. 154 (1978).

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The misrepresentations, according to defendants, are that an examination of the transcript of the telephone call, admitted as Government's Exhibit 47, reveals that Cirillo never advised Hogan that he had a partner named Frank, that he could provide Hogan with an additional four Thompson submachine guns, or that he was residing at the location where he took the return phone call from Hogan.

The Court concedes that this issue raises a question the resolution of which is a "close call."

Crucial to the probable-cause determination that the contraband was at the residence is the fact that Cirillo resided at the residence.

A close examination of Government's Exhibit 48 reveals that, although Cirillo never explicitly stated he was residing at the apartment, from the substance of the conversation as a whole a reasonable inference can be drawn that he, in fact, did reside at the apartment; therefore, any misrepresentations contained in the affidavit were immaterial and do not warrant suppression of the evidence.

It would have been more appropriate for the affidavit to relate the exact substance of the phone call so that the magistrate could have concluded that Cirillo did, in fact, reside at the apartment.

The Court recognizes the existence of this problem but finds that any misrepresentations contained in the affidavit were not enough to warrant suppression of the evidence. Compare *United States v. Melvin*, 596 F. 2d 492 (First Circuit), cert. denied, 100 Supreme Court Reporter 73 (1979).

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The final issue raised by defendants, that certain items found in the apartment were invalidly seized, is without merit.

The testimony adduced at the evidentiary hearing on these motions clearly established that the items not described in the search warrant were legally seized pursuant to the "plain view" doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

For all of the foregoing reasons the Court now rules that Defendants' Motions To Suppress are denied.

Counsel, I will read the order and we will furnish Mr. Gay with two copies, one for him and one for Mr. Ocks.

" O R D E R "

This is the order and I read it:

"AND NOW, this 13th day of March, 1981, it is hereby ORDERED that in accordanced with the Bench Ruling entered this date, Defendants' Motion To Suppress is DENIED.

"It is FURTHER ORDERED that this case shall proceed to trial on Tuesday, March 24th, 1981, at 10:00 A.M., E.S.T., in Courtroom 12-B, United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania 19106."

Miss Hooker, will you make a photostat. I thought we had three extra copies but you can give these two to Mr. Gay and then make a photostat of this, please, and give it to Mr. Welsh.

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MISS HOOKER (DEPUTY CLERK): Yes, sir.

MR. GAY: May I address the Court for a moment, sir?

THE COURT: Certainly, Yes.

MR. GAY: With regard to the trial date, would it be possible to have that matter set down for the 26th?

Would that cause a problem in the Court's calendar?

THE COURT: Excuse me.

Let me see the order, will you, Miss Hooker.

MR. GAY: That is Thursday, I believe.

THE COURT: Would you stand by a minute until I get my diary?

MR. GAY: I would be happy to, Your Honor.

THE COURT: And your reason, Mr. Gay?

MR. GAY: I have a matter that is in mid-trial now which was continued from I don't know the exact date in February to resume on the 23rd of March and it is to continue at least to the 24th and maybe the 25th.

THE COURT: And that is what judge, please?

MR. GAY: Judge Mims, currently in Bucks County.

THE COURT: I would be disposed to grant your request.

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What would you have to say to that, Mr. Welsh?

MR. WELSH: Your Honor, we would be prepared on either date.

THE COURT: All right.

Well, we will change it to the 26th, then.

MR. GAY: Thank you, sir.

THE COURT: And —

MR. GAY: I will give proper notice to Mr. Ocks and to both defendants, sir.

THE COURT: Yes.

Did you change your copy?

Here, I will put it on these copies.

MR. GAY: Mr. Bosta, how long would it take to get a copy of that?

THE COURT: We will stand in recess, and may I see Mr. Gay and Mr. Welsh in chambers?

MR. GAY: Yes, sir.

(Adjourned at 3:30 P.M.)

**APPENDIX B — ORDER OF UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT AFFIRMING
JUDGMENT**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 81-2019

UNITED STATES OF AMERICA

vs.

CIRILLO, ROBERT,

Appellant.

Appeal from the United States District Court for the Eastern
District of Pennsylvania
(D.C. Crim. No. 80-00346-02)

Argued March 15, 1982

Before: ALDISERT, VAN DUSEN, and GARTH, *Circuit
Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit,
that (1) the interception of the 9:51 P.M. telephone call violated
the minimization requirements of Judge Pollak's order of August
25, 1980; that (2) the affidavit in support of the search and seizure
warrant was based upon an illegal wiretap and contained material
misrepresentations necessary to the determination of probable
cause; and that (3) the controlled substances seized by the

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government from appellant's bedroom and bathroom closets were not in "plain view" and, therefore, illegally obtained; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: March 19, 1982

**APPENDIX C — ORDER OF UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT DENYING
REHEARING**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2018 and 81-2019

UNITED STATES OF AMERICA

v.

CAPOBIANCO, FRANK,

Appellant, No. 81-2018

(E.D. Pa. Crim. No. 80-00346-01)

UNITED STATES OF AMERICA

v.

CIRILLO, ROBERT,

Appellant, No. 81-2019

(E.D. Pa. Crim. No. 80-00346-02)

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*, and ALDISERT, ADAMS,
GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM,
SLOVITER, BECKER and VAN DUSEN, *Circuit Judges*.

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The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Aldisert
Judge

Dated: Apr. 16, 1982

**APPENDIX D — ORDER AUTHORIZING INTERCEPTION
OF WIRE COMMUNICATIONS**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN APPLICATION FOR AN ORDER AUTHORIZING THE
INTERCEPTION OF WIRE COMMUNICATIONS**

MISCELLANEOUS NUMBER

**TO: Special Agents of the Federal Bureau of Investigation, United
States Department of Justice**

Application under oath having been made before me by AUSA Joseph M. Fioravanti, United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, Oscar Glassman, and others as yet unknown, have committed and are committing offenses involving:

(1) offenses punishable under Section 892 and 894 of Title 18, United States Code (Extortionate Credit Transactions);

(b) there is probable cause to believe that particular wire communications of Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, and Oscar Glassman, and others as yet unknown concerning the above offenses will be obtained through the interception of said wire

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communications, authorization for which is applied for herein. In particular, these conversations will concern the identities of the victims of the alleged extortionate credit transactions, the amounts of monies involved in these transactions, and the identity of unknown individuals who are involved with Conwell, Mangini, Inadi, Walsh, Crosley, and Glassman in financing said transactions.

(c) normal investigative procedures either have been tried without success and reasonably appear to be unlikely to succeed if continued or reasonably appear to be unlikely to succeed if tried.

(d) there is probable cause to believe that telephones subscribed to by Charles T. Conwell, bearing telephone numbers (215) 335-9861 and (215) 332-7977, and located at the Waiting Room Bar, 8212 Roosevelt Boulevard, Philadelphia, PA, have been and are being used by Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, and Oscar Glassman and others as yet unknown, in connection with the commission of aforementioned offenses.

WHEREFORE, it is hereby ORDERED that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to Application authorized by the Assistant Attorney General in Charge of the Criminal Division, the Honorable Philip B. Heymann, who has been specifically designated by the Attorney General of the United States to exercise the power conferred upon him by Section 2516 of Title 18, United States Code:

(1) to intercept wire communications of Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, Oscar Glassman, and others as yet unknown,

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in connection with the aforementioned offenses, from telephones (215) 335-9861 and (215) 332-7977, located at the Waiting Room Bar, 8212 Roosevelt Boulevard, Philadelphia, PA.

(2) such interception shall not automatically terminate when the type of communication described above in Paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the manner in which Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, Oscar Glassman, and others as yet unknown, participate in the aforementioned offenses, and which reveal the identities of their co-conspirators, their places and manner of operation and the nature of the conspiracy involved therein, or for a period of thirty (30) days from the date of this Order, whichever is earlier.

IT IS FURTHER ORDERED that Special Agents of the Federal Bureau of Investigation, involved in the actual performance of making the herein authorized interceptions, may monitor and record the type of communications sought to be intercepted only during those times when by visual observation or voice identification, it has been determined that either Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, Oscar Glassman, is actually present inside the premises known as the Waiting Room Bar, 8212 Roosevelt Boulevard, Philadelphia, PA.

PROVIDING THAT, with respect to the interception of wire communications on telephone (215) 335-9861, which is a coin operated public telephone located at the Waiting Room Bar, 8212 Roosevelt Boulevard, Philadelphia, PA, the following conditions shall apply:

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(1) no communications shall be intercepted unless it has been determined that either Charles T. Conwell, Michael James Mangini, Joseph Inadi, or Oscar Glassman are within the premises known as the Waiting Room Bar, 8212 Roosevelt Boulevard, Philadelphia, PA.

(2) with respect to outgoing telephone calls made from telephone (215) 335-9861, monitoring shall cease after 30 seconds of conversations unless it is determined that Charles T. Conwell, Michael James Mangini, Joseph Inadi, Jr., Thomas J. Walsh, Joseph Crosley, or Oscar Glassman is a participant in the conversation.

IT IS FURTHER ORDERED, upon request of the Applicant, that the Bell Telephone Company of Pennsylvania, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith, all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted. The furnishing of such facilities or technical assistance by the Bell Telephone Company of Pennsylvania is to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT, Assistant United States Attorney Joseph M. Fioravanti, shall provide the Court with a written report on or about the fifth, tenth, fifteenth, twentieth, and twenty-fifth day following the date of this Order, or as often as the Court may require, showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

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PROVIDING FURTHER THAT, this authorization to intercept wire communications shall be executed as soon as practicable after the signing of this Order, and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon the attainment of the authorized objective or in any event, at the end of thirty (30) days from the date of this Order.

BY THE COURT:

**United States District Judge
Eastern District of Pennsylvania
Philadelphia, Pennsylvania**

DATE:

**APPENDIX D — TRANSCRIPTION OF 9:51 P.M.
TELEPHONE CALL**

File #	183-704
EDPA #	222
Date of Call	8/25/80
Time of Call	9:51 PM
Type of Call	Outgoing
Monitoring Agent	William Heilman, III
Transcribing Agent	Ronald P. Schneck
Date Transcript Typed	9/3/80

Participants: CH - CHARLIE HOGAN
BC — BOBBY CIRILLO
UI — UNINTELLIGIBLE

CH: Not with this shit.

BC: Naw, uh, see like when I told the today, you know

CH: Yeah

BC: I didn't get done work 'till 5:00
like

CH: Yeah

BC: And then I got on the phone you know and I wanted to just quarter it out because I didn't want to, I didn't want to gram it.

CH: Yeah

BC: So because if I quartered and it goes, you know what I mean I can put 24 on it.

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CH: Yeah

BC: You know if it's pure. How good is it?

CH: It's pretty pure.

BC: It's a block?

CH: No, no

BC: It's . . .

CH: It's like 88, 89, 90, that's how pure it is.

BC: Uh, huh

CH: It's in the high 80's

BC: Uh, huh

CH: Yeah, the fuckin' people around here are only used to getting 60, 65.

BC: 50

CH: No, this is how strong it is.

BC: Yeah, I know. And I got hooked up with this other deal and all, (UI), you know.

CH: Yeah.

BC: So I got a real nice brand new Thompson machine gun, you know

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CH: Yeah

BC: And between me and my partner we could come up with the other four. But we still would have the piece involved because we don't have no money. That's how come I'm working. I got the kid living with me you know.

CH: Mmm.

BC: And I'm not the type to burn you know

CH: Yeah.

BC: I do whatever I got to do. I'll stay up 40 hours a day to, you know what I mean

CH: Yeah

BC: To get the dust together for ya.

CH: Well, that's just one of them things, you know.

BC: I know.

CH: With this kind of stuff you can't do that.

BC: You know I understand that I understand that but

(Beeping tone interrupts conversation)

CH: Carry yeah

BC: When they come they hit it and they see ya. You know there's no more dealings there.

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CH: You think you'll be in shape tomorrow night.

BC: To me, Charlie I hope so

CH: Well, then I'll give you a call tomorrow night around 6, 7 o'clock.

BC: Yeah. Well it has to be a little later 'cause I got the kid livin' with me now.

CH: Well make it 8, 9 o'clock

(Beeping tone interrupts conversation)

CH: I'll call you and you let me know.

BC: Yeah

CH: Okay buddy.

BC: That's the best you could do with it Charlie?

CH: That's the best, yeah.

BC: Uh, huh. All right are you gonna be around there for awhile?

CH: For a few days, yeah.

BC: Where, where I can I reach you like tonight around 10:30-11:00.

CH: I'm over in Jersey, uh, but I won't be there until like 12:00 and then I got somebody comin'.

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(Beeping)

CH: Some shit and then you know.

BC: Yeah, yeah.

CH: Leave it go and I'll call you tomorrow night.

BC: 'Cause I hate to lose it.

CH: If it's, us if, it's a good deal today. It'll be a good deal tomorrow.

BC: Yeah, but I hate to lose you know. I hate to lose what I got access to you know.

CH: Yeah

BC: And like I haven't seen you for awhile and when we did those other ones you know.

(Beeping tone)

BC: (UI) It worked out

CH: Is that your phone or this?

BC: That's this one. The clicking

CH: Uh

BC: Dial tone, yours isn't where are you calling from?

CH: From

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BC: The stop

CH: Yeah

BC: The Waiting Room

CH: Yeah

BC: Yeah you're all right there. I got that wait-a-tone.

CH: Yeah.

BC: You know

CH: All right, I'll give you a call tomorrow night about 9:00

BC: Yeah

CH: All right

BC: And, Frank, you know Frankie

CH: Yeah

(Beeping)

CH: I'll talk to

BC: Okay

CH: All right

BC: Me or him.

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CH: All right

BC: We'll have like I say the cash, you know.

CH: Okay, then I'll talk to you tomorrow night.

BC: Yeah, and if you know anybody that wants to do a brand new Thompson.

CH: Okay.

BC: Never been shot

CH: Yeah

BC: Oval clip, ah, banana clip.

CH: Should have no trouble with that.

BC: No, but you see like I don't want to . . .

(Beeping)

BC: with it. You know what I mean.

CH: Yeah

BC: I'd rather do a deal to make like a G or two

CH: Yeah

BC: On the other product

CH: Yeah

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BC: But I don't want to gram it or nothin'.

CH: I understand.

BC: You know what I mean.

CH: Sure.

BC: I want to bulk it.

CH: Yeah

BC: So, I just got home from taking him to football and . . .

(Beeping)

CH: All right, then I'll give you call tomorrow night about 9:00 at home.

BC: Yeah

CH: Okay buddy

BC: Do that and then you know, we could, you know, we could hook up.

CH: All right, I'll call you tomorrow night then all right.

BC: And, uh, if you can do something when you go back, with some herb or somethin'.

CH: Yeah

BC: I'll take the trip.

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(Becomes non-pertinent and conversation ends)

CH: OK, I'll tell you tomorrow night about nine o'clock on this thing

BC: I wanna be friends over this thing, you know what I mean

APPENDIX D — SEARCH WARRANT

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

Docket No.
Case No.

UNITED STATES OF AMERICA

vs.

2555 Old Trevoise Road, Apartment N-15, Trevoise, Pennsylvania,
being further described as one unit of a garden-type apartment
complex

To Special Agent Robert J. Brown, FBI or any other authorized
agent

Affidavit(s) having been made before me by Special Agent Robert J. Brown, FBI that he has reason to believe that on the premises known as 2555 Old Trevoise Road, Apartment N-15, Trevoise, Pennsylvania, being further described as one unit of a garden-type apartment complex in the Eastern District of Pennsylvania there is now being concealed certain property, namely A Thompson submarine gun with ammunition, including but not limited to a semi-circular ammunition clip commonly known as a "banana" clip and an oval shaped ammunition clip known as a "drum" clip and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

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You are hereby commanded to search within a period of _____ (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search [in the daytime (6:00 a.m. to 10:00 p.m.; at any time in the day or night*) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before _____ as required by law.

Dated this day of , 19

*Judge (Federal or State Court of Record)
or Federal Magistrate.*

The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

Appendix D

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Docket No.

Case No.

UNITED STATES OF AMERICA

vs.

2555 Old Trevoise Road, Apartment N-15, Trevoise, Pennsylvania,
being further described as one unit of a garden-type apartment
complex

AFFIDAVIT FOR SEARCH WARRANT

BEFORE PETER B. SCUDERI, PHILADELPHIA,
PENNSYLVANIA

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 2555 Old Trevoise Road, Apartment N-15, Trevoise, Pennsylvania, being further described as one unit of a garden-type apartment complex in the Eastern District of Pennsylvania there is now being concealed certain property, namely A Thompson submarine gun with ammunition, including but not limited to a semi-circular ammunition clip commonly known as a "banana" clip and an oval shaped ammunition clip known as a "drum" clip, which is possessed in violation of Title 26, United States Code, Section 5861(d).

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And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

1. On August 8, 1980, United States District Court for the Eastern District of Pennsylvania, by the Honorable Louis H. Pollak, authorized interception of telephone communications of (215) 335-9861 located at the Waiting Room Bar, 8212 Roosevelt Boulevard, Philadelphia, Pennsylvania, pursuant to Title 18, United States Code, Section 2510 *et seq.*, which order is currently sealed and impounded by order of Judge Pollak of the same day.

2. On August 25, 1980, at approximately 8:40 p.m., an incoming telephone call was received from an individual identifying himself as "Bob Cirillo" at the above-mentioned telephone number asking that this telephone call be returned by Charles Hogan at telephone number (215) 245-7238.

3. Your affiant has determined that the telephone (215) 245-7238, is registered to Frank Copobianco at Apartment N-15, 2555 Old Trevoise Road, Trevoise, Pennsylvania.

4. On August 25, 1980, at approximately 9:15 p.m., in an outgoing call from (215) 335-9861, an individual identifying himself as "Charlie" placed a telephone call to (215) 245-7238 and engaged in a conversation with Robert Cirillo.

5. In connection with a previous investigation, your affiant was in possession of voice exemplars submitted to the government by Charles Hogan, your affiant has compared the subject voice exemplars with the individual who placed the telephone call referred to in paragraph 4, hereinabove, and according to the judgment of your affiant, the caller referred to in paragraph 4 above is Charles Hogan.

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6. In the course of the telephone conversation referred to in paragraph 4 hereinabove between Cirillo and Hogan, Cirillo advised Hogan that he could sell Hogan a Thompson submachine gun with ammunition including a "banana" clip and a "drum" clip; Cirillo further advised Hogan that Cirillo and his partner, "Frank", could provide Hogan with an additional four Thompson submachine guns.

7. During the telephone conversation referred to in paragraph 4 above, Cirillo advised Hogan that Cirillo was residing at the location where he took the return call from Hogan, identified hereinabove in paragraph 3 as the residence of Frank Copobianco.

8. A check of criminal extracts reveals that Charles Hogan has been convicted nine separate times of crimes including gambling, obstruction of justice, burglary, larceny and possession of stolen goods.

9. Your affiant has caused a search to be made of the National Firearms Registration and Transfer Records of the Bureau of Alcohol, Tobacco and Firearms to determine whether Robert Cirillo and Frank Copobianco had any firearms registered to them. They did not.

10. A Thompson submachine gun is a 'machine gun' within the definition of Title 26, United States Code, Section 5845 (b).

APPENDIX D — INDICTMENT

REW:mq

File No. 80-1735

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CRIMINAL NO. 80-00346

**VIOLATION: 21 U.S.C. §841(a)(1) (Possession with intent to
distribute — 2 Counts)
26 U.S.C. §5861 (unlawful possession of a firearm — 2 Counts)**

UNITED STATES OF AMERICA

v.

**FRANK CAPOBIANCO
ROBERT CIRILLO**

COUNT ONE

THE GRAND JURY CHARGES:

That on or about August 26, 1980, at Trevoise, in the Eastern District of Pennsylvania, defendants FRANK CAPOBIANCO and ROBERT CIRILLO, did knowingly and intentionally possess with intent to distribute 2132 tablets containing methaqualone, a Schedule II, non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

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COUNT TWO

THE GRAND JURY FURTHER CHARGES:

That on or about August 26, 1980, at Trevese, in the Eastern District of Pennsylvania, defendants FRANK CAPOBIANCO and ROBERT CIRILLO, did knowingly and intentionally possess with intent to distribute approximately 108.3 grams of marijuana, a Schedule I, non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

That on or about August 26, 1980, at Trevese, in the Eastern District of Pennsylvania, defendant ROBERT CIRILLO knowingly and unlawfully possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Register and Transfer Record, as required by Title 26, United States Code, Section 5841.

In violation of Title 26, United States Code, Section 5861(d).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES:

That on or about August 26, 1980, at Trevese, in the Eastern District of Pennsylvania, defendant ROBERT CIRILLO, knowingly and unlawfully possessed a firearm, that is, a destructive device, which was not identified by a serial number as required by Title 26, United States Code, Section 5842.

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In violation of Title 26, United States Code, Section 5861(i).

A TRUE BILL:

FOREMAN

s/ Peter F. Vaira
PETER F. VAIRA
United States Attorney

41a

APPENDIX D — MOTIONS TO SUPPRESS EVIDENCE
IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-00346(1)

UNITED STATES OF AMERICA

v.

FRANK CAPOBIANCO

RULE

AND NOW, to wit, this _____ day of _____,
19____, a RULE is entered upon the United States Government
to show cause why the annexed Motion should not be granted.

RULE RETURNABLE THE _____ day of
, 19 ____ .

BY THE COURT:

J.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-00346(I)

UNITED STATES OF AMERICA

v.

FRANK CAPOBIANCO

ORDER

AND, NOW, to wit, this day of ,
19 , upon consideration of the within annexed Motion and
upon hearing in open Court, it is hereby ORDERED AND
DECREED that:

1. All evidence seized by the United States Government
as a result of an illegal search and seizure is hereby
suppressed;
2. That any statement obtained by the United States
Government as a result of any illegal or constitutionally
defective activity by the United States Government is
hereby suppressed;
3. That the out of court identification of the Petitioner
by the complaining witness(es) is hereby suppressed.

BY THE COURT:

J.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-00346(1)

Violation: 21 U.S.C. §8841(a)(1)
(Possession with intent to
distribute - 2 counts)

UNITED STATES OF AMERICA

v.

FRANK CAPOBIANCO

MOTION TO SUPPRESS EVIDENCE PURSUANT TO RULE
12 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The application of FRANK CAPOBIANCO, by his attorney,
HERBERT L. OCKS, ESQUIRE, respectfully represents:

1. That the Petitioner was arrested on August 27, 1980, and
charged with violation of 21 U.S.C. 841(a)(1).

2. That the Petitioner's arrest was illegal in that it lacked
probable cause.

3. That the fruits of this search and seizure should be
suppressed for the following reasons:

(a) Petitioner's arrest lacked probable cause;

(b) The search warrant lacked probable cause;

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(c) The search warrant was improperly executed;

(d) The search warrant was based upon information secured by constitutionally defective wire taps.

4. That if any statements were made by the Petitioner, they should be repressed on the grounds of:

(a) Petitioner's arrest lacked probable cause;

(b) Petitioner was not given his *Miranda* warnings;

(c) Petitioner's statement was involuntary and given under duress or coercion; or

(d) Was otherwise constitutionally defective.

5. That any and all identifications of the Petitioner should be suppressed because of the suggestive and illegal activities of the United States Government.

WHEREFORE, Petitioner respectfully prays that the Honorable Court grant Petitioner's Motion to Suppress Evidence as follows:

1) That the Honorable Court suppress all evidence seized by the United States Government as a result of an illegal search and seizure.

2) That the Honorable Court suppress any statement obtained by the United States Government as a result of any illegal or constitutionally defective activity by the United States Government.

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3) That the Honorable Court suppress any out of court identification of the Petitioner.

HERBERT L. OCKS, ESQUIRE
Bloom, Ocks, Fisher & Anderson
113 South 21st Street, Phila.,
PA19103
Attorney for Petitioner

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COMMONWEALTH OF PENNSYLVANIA:

: ss

COUNTY OF PHILADELPHIA

:

FRANK CAPOBIANCO, being duly sworn according to law,
deposes and says that he is the Petitioner in the above captioned
matter; that the facts set forth in the within instrument are true
and correct to the best of his knowledge, information and belief.

s/ Frank Capobianco
FRANK CAPOBIANCO

SWORN TO AND SUBSCRIBED

before me this 7th

day of November, 1980.

s/ Eileen M. Statuti
NOTARY PUBLIC

Eileen M. Statuti
Notary Public, Phila, Phila. Co.
My Commission Expires July 27, 1981

*Appendix D***MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION
TO SUPPRESS EVIDENCE**

The Petitioners were arrested on August 27, 1980, and indicted on charges of knowingly and intentionally possessing with the intent to distribute a controlled substance and knowingly and unlawfully possessing a firearm.

Argument**I. Search Warrant**

Counsel for the Petitioner has made repeated requests on the Government to produce the "affidavit" required for the issuance of this search warrant. Despite the requests and its obvious importance in establishing whether probable cause existed for the issuance of the warrant, the Government has not yet complied. The affidavit for a search or an arrest warrant must state facts which constitute probable cause to enable the Magistrate to make a probable cause determination. *Aguilar v. Texas*, 378 US 108 (1964).

The importance of the accused's right to access to the affidavit was clearly established in *Franks v. Delaware*, 438 US 154 (1978). In *Franks*, the defendant attempted to challenge the veracity of the warrant affidavit in the state court, which refused. The United States Supreme Court reversed and remanded, holding that the Fourth Amendment required that a hearing be held so that the defendant could challenge the truthfulness of factual statements contained in the affidavit. Thus, without the constitutionally required affidavit, the Petitioner's Fourth Amendment rights were violated when the illegal search and seizure was made.

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As the Court of Appeals for the Fourth Circuit said in *U.S. v. Salvucci*, 599 F. 2d 1904, 1097 (4th Cir. 1979):

“Undated, conclusory information from anonymous source . . . with no other reasonably specific clues to the time is inadequate to justify a finding of probable cause.”

Here there is no basis upon which the Petitioner may even challenge this conclusory search warrant.

II. Electronic Surveillance

The electronic surveillance of the Petitioner which led to issuance of the search warrant was constitutionally defective. The alleged purpose of the wiretap was to ascertain the existence of criminal activity wholly unrelated to the Petitioner. The Petitioner was neither the target nor the focus of this electronic surveillance. Therefore, the use of any information constitutes an unreasonable search and seizure violation of the Petitioner's Fourth Amendment rights. *Smith v. Maryland*, 442 US 735 (1979).

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-00346(2)

UNITED STATES OF AMERICA

v.

ROBERT CIRILLO

R U L E

AND NOW, to wit, this day of , 19 , a
RULE is entered upon the United States Government to show
cause why the annexed Motion should not be granted.

RULE RETURNABLE the day of , 19 .

BY THE COURT:

J.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-00346(2)

UNITED STATES OF AMERICA

v.

ROBERT CIRILLO

O R D E R

AND NOW, to wit, this day of , 19 , upon
consideration of the within annexed Motion and upon hearing
in open Court, it is hereby ORDERED AND DECREED that:

1. All evidence seized by the United States Government as
a result of an illegal search is hereby suppressed;
2. That any statement obtained by the United States
Government as a result of any illegal or constitutionally defective
activity by the United States Government is hereby suppressed;
3. That the out of court identification of the Petitioner by
the complaining witness(es) is hereby suppressed.

BY THE COURT:

J.

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 80-00346 (2)

Violation: 21 U.S.C. §841(a)(1) (Possession with intent to
distribute — 2 counts)

26 U.S.C. §5861 (Unlawful possession of a firearm — 2 counts)

MOTION TO SUPPRESS EVIDENCE PURSUANT TO RULE
12 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The application of ROBERT CIRILLO, by his attorney,
ANDREW G. GAY, ESQUIRE, respectfully represents:

1. That the Petitioner was arrested on August 27, 1980, and
charged with violation of 21 U.S.C. §841(a)(1) and 26 U.S.C.
§5861.

2. That the Petitioner's arrest was illegal in that it lacked
probable cause.

3. That the fruits of this search and seizure should be
suppressed for the following reasons:

(a) Petitioner's arrest lacked probable cause;

(b) The search warrant lacked probable cause;

(c) The search warrant was improperly executed;

(d) The search warrant was based upon information
secured by constitutionally defective wire taps.

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4. That if any statements were made by the Petitioner, they should be repressed on the grounds of:

- (a) Petitioner's arrest lacked probable cause;
- (b) Petitioner was not given his *Miranda* warnings;
- (c) Petitioner's statement was involuntary and given under duress or coercion; or
- (d) Was otherwise constitutionally defective.

5. That any and all identifications of the Petitioner should be suppressed because of the suggestive and illegal activities of the United States Government.

WHEREFORE, Petitioner respectfully prays that the Honorable Court grant Petitioner's Motion to Suppress Evidence as follows:

1) That the Honorable Court suppress all evidence seized by the United States Government as a result of an illegal search and seizure.

2) That the Honorable Court suppress any statement obtained by the United States Government as a result of any illegal or constitutionally defective activity by the United States Government.

3) That the Honorable Court suppress any out of court identification of the Petitioner.

ANDREW G. GAY, ESQUIRE
1910 Spring Garden Street
Philadelphia, PA 19130
Attorney for Petitioner

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COMMONWEALTH OF PENNSYLVANIA :

:ss

COUNTY OF PHILADELPHIA :

ROBERT A. CIRILLO, being duly sworn according to law,
deposes and says that he is the Petitioner in the above captioned
matter; that the facts set forth in the within instrument are true
and correct to the best of his knowledge, information and belief.

s/ Robert A. Cirillo
ROBERT A. CIRILLO

SWORN TO AND SUBSCRIBED
before me this 7th
day of November, 1980.

s/ Eileen M. Statuti
NOTARY PUBLIC

EILEEN M. STATUTI
Notary Public, Phila., Phila. Co.
My Commission Expires July 27, 1981

*Appendix D*MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION
TO SUPPRESS EVIDENCE

The Petitioners were arrested on August 27, 1980, and indicted on charges of knowingly and intentionally possessing with the intent to distribute a controlled substance and knowingly and unlawfully possessing a firearm.

Argument

I. Search Warrant

Counsel for the Petitioner has made repeated requests on the Government to produce the "affidavit" required for the issuance of this search warrant. Despite the requests and its obvious importance in establishing whether probable cause existed for the issuance of the warrant, the Government has not yet complied. The affidavit for a search or an arrest warrant must state facts which constitute probable cause to enable the Magistrate to make a probable cause determination. *Aguilar v. Texas*, 378 US 108 (1964).

The importance of the accused's right to access to the affidavit was clearly established in *Franks v. Delaware*, 438 US 154 (1978). In *Franks*, the Defendant attempted to challenge the veracity of the warrant affidavit in the state court, which refused. The United States Supreme Court reversed and remanded, holding that the Fourth Amendment required that a hearing be held so that the Defendant could challenge the truthfulness of factual statements contained in the affidavit. Thus, without the constitutionally required affidavit, the Petitioner's Fourth Amendment rights were violated when the illegal search and seizure was made.

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As the Court of Appeals for the Fourth Circuit said in *U.S. v. Salvucci*, 599 F.2d 1904, 1097 (4th Cir. 1979):

"Undated, conclusory information from anonymous source . . . with no other reasonably specific clues to the time is inadequate to justify a finding of probable cause."

Here there is no basis upon which the Petitioner may even challenge this conclusory search warrant.

II. Electronic Surveillance

The electronic surveillance of the Petitioner which led to issuance of the search warrant was constitutionally defective. The alleged purpose of the wiretap was to ascertain the existence of criminal activity wholly unrelated to the Petitioner. The Petitioner was neither the target nor the focus of this electronic surveillance. Therefore, the use of any information constitutes an unreasonable search and seizure violation of the Petitioner's Fourth Amendment rights. *Smith v. Maryland*, 442 US 735 (1979).

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Fourth Amendment:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

18 U.S.C. §2518(10)(a):

“(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication, intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

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(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."